

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Order delivered on: 7th June, 2013*

+ **W.P.(C) No.2999/2013 & CM No.7146/2013, CM No.6675/2013 & CM No.6759/2013**

OPUS GROUP AB Petitioner
Through Mr. Ravi Gupta, Sr. Advocate with
Mr. Shyamal Kumar, Advocate

Versus

MINISTRY OF ROAD TRANSPORT AND HIGHWAYS
..... Respondent
Through Mr. Rajeeve Mehra, ASG with
Mr. Amrit Pal Singh and Mr. Aditya
Malhotra, Advocates for UOI
Mr. Sandeep Sethi, Sr. Advocate with
Mr. Varun Kumar and Ms. Meghna
Mishra, Advocates for Applicant in
CM No.6759-60/2013 for
impleadment

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH
HON'BLE MR. JUSTICE R.V. EASWAR

MANMOHAN SINGH, J.

1. As per order dated 31st May, 2013, the abovementioned three applications are listed for hearing. Parties have made their submissions in these applications as well as in the main writ petition.
2. Brief facts leading up to filing of the present petition are enunciated as under:

- a) The petitioner herein claims to be a multinational company incorporated in Sweden. The petitioner claims to be a worldwide vehicle inspection industry group with the sole focus on vehicle testing and diagnostics. The petitioner has made bidding in response to the respondent's tender No.RT-11036/12/2012-MVL dated 1st November, 2012.
- b) It is submitted that the technical bid for the aforesaid tender was required to be submitted by the eligible companies by 31st December, 2012.
- c) The petitioner was having the expertise in the field was eligible and capable duly submitted its technical bid in the sealed cover with an earnest money of Rs.60,00,000/- in the form of Bank Guarantee issued by SBI, Parliament Street, New Delhi.
- d) The petitioner submits that while filing the technical bids, the petitioner has provided the details of the contact persons for the further communication as required by the tender to be submitted and also their telephone numbers and their E-Mail ID. The petitioner states that in the aforesaid form, the details of the contact person for further communication is mentioned as Mr. Lothar Geilen and Mr. William Dell and their E-Mail IDs are provided as lothar.geilen@systech-ESP.com and bill.dell@systech-ESP.com respectively
- e) It is submitted that the respondent thereafter in the month of February 2013 required certain clarification from the petitioner vide its letter dated 21st February, 2013 which was sent to the general E-Mail address of the petitioner namely

Magnus.Greko@opus.se instead of the E-Mail IDs of the relevant persons provided by the petitioner.

- f) The petitioner submits that despite the fact that the petitioner provided the E-Mail IDs categorically in the bid documents, the E-Mail could not be sent to the right persons who were attending the matter pertaining to the present technical bid. Due to the non delivery of the communication to the contact person, the detailed information required by the letter dated 21st February, 2013 could not be supplied by 1st March, 2013 which was the deadline for submissions of the documents.
- g) The information which was sent by the respondent at the E-Mail Id namely Magnus.Greko@opus.se could not be traced upto 11th March, 2013 as the said E-Mail treated as spam by the computer of the said person.
- h) The petitioner states that immediately upon the discovery of the E-Mail dated 21st February, 2013, the petitioner supplied the information as required in the respondent letter on 11th March, 2013 and 14th March, 2013.
- i) The petitioner submits that despite there being no fault of the petitioner, the respondent refused to accept the documents and passed the order dated 4th April, 2013 that the clarifications were submitted belatedly and thus could not be accepted.

3. Feeling aggrieved by the order dated 4th April, 2013, the petitioner filed the instant writ petition under Article 226 of the Constitution of India

mainly on the ground that the petitioner cannot be permitted to be prejudiced on account of the fault of the respondent. It is the respondent itself which has made the mistake in sending the clarifications at the wrong E-Mail address and thus cannot be allowed to say that the petitioner is guilty of supplying the clarifications beyond the time provided for the clarification.

4. The said petition was listed before the Division Bench of this Court on 8th May, 2013, when this court believing the stand of the petitioner passed the following order:

“WP(C) No.2999/2013 & CM No.5653/2013 (Stay)

Learned counsel for the petitioner has filed in Court an affidavit of the petitioner affirmed on 8.5.2013 with annexures with a copy to learned counsel for the respondent. The affidavit is taken on record.

On hearing learned counsel for the petitioner it appears that even though as per Annexure P-2 the names and e-mail addresses of the contact person as well as the alternate contract person were given, the respondent mistakenly sent the e-mail to a wrong address, i.e., they wrongly spelt “loather” as “loather”. The result was that the contact person never received the e-mail and could not submit the necessary details/clarifications by the cut off date of 1.3.2013. It is stated that the principal based in Sweden received the e-mail and when he communicated with the contract person in the U.S. on 11.3.2013, the necessary details were sent but vide impugned letter dated 4.4.2013, the same have not been accepted for consideration on the basis that they were submitted beyond the time for which the cut off date was 1.3.2013.

It, thus, *prima facie* appears that the petitioner is sought to be prejudiced for a fault of the respondent in sending the e-mail to the contact person at a mis-spelt address which was never received. It is undisputed that no intimation was sent to

the alternate contact person.

Let notice issue to the respondent to show cause as to why rule *nisi* be not issued returnable on 10.7.2013.

Learned counsel for the respondent accepts notice.

Counter affidavit be filed within two (2) weeks. Rejoinder be filed within a week thereafter.

It is directed that till the next date of hearing the technical scrutiny of the other bids can go on but the financial bid will not be opened nor will the technical and financial bids of the petitioner be returned to the petitioner. The respondent to scrutinize the technical bid of the petitioner with the material sent on 11/14.3.2013 and to submit a report qua the technical eligibility of the petitioner in that situation in a sealed cover to this Court. We may note that these directions have been passed keeping in mind the submission of the learned counsel for the petitioner that as yet only scrutiny of technical bids is in progress and the financial bids have not been opened though learned counsel for the respondent states that he had no instructions in this matter.

If the respondent is itself inclined to consider the additional material sent by the petitioner on 11/14.3.2013 for the technical bids in view of what is stated hereinabove then it would be permissible for the respondent to open the financial bids of all parties including the petitioner.

Dasti to learned counsels for the parties under the signatures of the Court Master.”

5. It is clear that the said order dated 8th May, 2013 was passed by this Court on the premise that the communication dated 21st February, 2013 was sent to the wrong E-Mail ID where the spelling was improper and thus the contact person never received the communication dated 21st February, 2013.

It was however mentioned that the principal of the contact person received the E-Mail.

6. It is further clear that the said order dated 8th May, 2013 records that the technical scrutiny of the bids can go on but the financial bid shall not be opened. The said order was passed on the basis that the financial bids have not been opened so far as per the information given by the learned counsel for the petitioner on the said date to the court.

7. Pursuant to the service, the respondent has filed the application seeking vacation of the order dated 8th May 2013 being CM No.6760/2013 also CM No.6675/2013 seeking the review of the order. The said applications are preferred by the respondent on the following grounds:

- a) That the plea taken by the petitioner that it is the respondent who has sent the communication dated 21st February, 2013 to the wrong E-Mail ID is not correct in as much as it is the petitioner who has filled up the form wherein the general details of the company and contact persons are filled up by him. It is not as if that the respondent has sent the said communication to altogether different E-Mail ID but has sent the communication to one of the given addresses of the petitioner. The respondent informs that the purpose of taking the information about number of E-Mail IDs is that the communication may be sent to any of the E-Mail IDs so that it should reach the applicant.
- b) The respondents has stated that the petitioner cannot deny having received the E-Mail dated 21st February, 2013, the only objection of the petitioner is that the said communication was sent to general E-Mail address and not to the contact person address. Thereafter, the petitioner states that the said E-Mail went into the spam folder of the

petitioner company. The respondent has stated that even if the said stand of the petitioner is to be believed, the respondent is at no fault if the said E-Mail went into the spam folder of the petitioner. It has been further stated by the respondent that it is not the respondent to blame if the petitioner himself could not discover the E-Mail to his E-Mail ID. The petitioner ought to have been more vigilant while checking the E-Mails. The crux of the matter is that the petitioner himself provided the said E-Mail ID of the petitioner company of Sweden. The said E-Mail was sent to the applicant company which is from Sweden and not to the alien company. Now, if the petitioner himself makes a delay due to departmentalization and technical flaws, the same cannot be attributed to the respondent.

- c) The respondents has further stated that the petitioner has made a wrong statement to this Court on 8th May, 2013 when this Court passed the order that it is only the technical bids which are under scrutiny. It has been informed by the respondent that the technical bids are already been scrutinized on 8th March, 2013. The financial bids are already opened on 9th April, 2013. The tender process is over. The petitioner has deliberately concealed this information at the time when this court passed the order. The said order as such cannot be implemented and the petition ought to be dismissed.

8. Additionally, M/s Rosmerta Technologies Ltd. who has been declared as lowest prospective bidder has filed the application seeking impleadment in the present petition on the ground that the rights of the said entity is being affected adversely and therefore the said party should be allowed to join the

present proceedings.

9. The present petition came up for hearing on 3rd June, 2013, when Mr. Ravi Gupta, learned Senior counsel appeared on behalf of the petitioner and Mr. Rajeeve Mehra, learned ASG appeared on behalf of the respondent. Both the counsels virtually reiterated the pleas raised in the petition in the form of the arguments addressed across the bar in the main matter as well as in the pending application and the same are not repeated for the sake of brevity. We have gone through the petition, documents filed therewith, applications seeking modification of the order and the response of the respondent in the matter in relation to the grievance raised by the petitioner.

10. It is true that the petitioner has filed up in the bidding form wherein the contact details of two persons namely Lothar Geilen and William Dell find mention. It is also correct that the clarifications which were called upon by the respondent for the petitioner's to comply with are of trivial nature. However, it cannot also be lost sight of that the petitioner has itself also given an E-Mail ID namely Magnus.Greko@opus.se in the general details of the applicant while filing the form and presenting it before the respondent. It is equally noteworthy to mention that the E-Mail ID namely Magnus.Greko@opus.se belongs to the petitioner who is applicant in the bidding document which is Swedish entity and not the person who is unconnected with the tender proceedings. It is also a matter of fact as per petitioner's own saying that the petitioner did receive the E-Mail at the E-Mail ID at Magnus.Greko@opus.se on 21st February, 2013 itself calling upon the petitioner to provide clarification. However, the said E-Mail could not be discovered by the petitioner as it went into the spam folder.

11. It is however, the argument of the petitioner that the E-Mail could not

be received by the contact person who has been provided in the bidding form which became the reason for belated submission of the response to the communication dated 21st February, 2013. We find that the said argument of the petitioner cannot be acceded to in order to infer that there exists any mistake or malice or arbitrariness on the part of the respondent. The reason for this is very simple which is that when the petitioner itself being an applicant in the bidding form has provided number of E-Mail IDs and also mentioned the first E-Mail ID in the general details as the one belonging to the petitioner company who is the applicant to such crucial bidding proceedings. It is inconceivable to expect a multinational like petitioner to provide the E-Mail ID for communication which the petitioner itself checks infrequently.

12. In the era of fast communication where E-Mails are exchanged across the globe on day to day basis and instructions are received by agents from the principals within a span of hours or within a day, it is quite unreasonable or rather unusual to expect that the company like petitioner which gives an E-Mail ID as given id in the bidding form does not check the E-Mails for almost 18 days and discovers the E-Mail only on 11th March, 2013. Such a lethargy from the company which claims to be contesting a highly competitive bid cannot be expected and more so when the E-Mails are discovered in a short span of time and can be addressed to if they are attended precautions.

13. Mr.Mehra, learned ASG, submits that the respondent on inquiry from the Assistant General Manager, Trade Finance CPC, State Bank of India, it was confirmed that the petitioner has in fact requested the bank vide information dated 23rd May, 2013 for extension of bank guarantee upto 15th

July, 2013. He further refers to the minutes of third meeting of the Committee constituted to evaluate the bids received for Procurement of Technical Equipment for I&C Centre which was held under the chairmanship of Joint Secretary (T) on 20th March, 2013, particularly para 4 of the same which reads as under:

“4. The request of M/s OPUS was discussed in the meeting of Committee. The Committee is of the view that as admitted by M/s OPUS, since Ministry’s letter was delivered to the bidder on at least one e-mail address, and it is the responsibility of the company to keep a check on the e-mails diverted to spam folder could be traced only 11.03.2013, therefore no further time can be given to the bidder. The Committee further noted that the bidder in their letter dated 11th March 2013, received on 14th March 2013 in the Ministry, stated that the extended BG for EMD will be delivered forthwith. But till the date of the meeting, the extend BG also has not been received. Besides, the document provided by the M/s OPUS was also not a clear copy. In fact the upper portion of the document is not clear. In view of the above, the Committee in the absence of any evidence of non-receipt of this Ministry’s letter dated 21st February 2013 and non furnishing of extended Earnest Money Deposit (i.e. up to 15.07.2013), in time the Committee decided not to accept the clarification/document submitted by the M/s OPUS.”

14. Mr.Mehra has also referred to certain portions of the minutes of the meeting of the Committee constituted to evaluate the bids received for Procurement of Technical Equipment for I&C Centre under the Chairmanship of Joint Secretary (T) held on 16th April, 2013 where the list of participants was discussed. He referred to para 8 of the said meeting which reads as under:

“In view of para 7 above, the committee finds that the total amount of rate quoted applicable for this tender may be taken as the amount which is as per calculation done. This amount comes to Rs.46,44,11,948/-. Since, Rs.46,44,11,948/- is the lowest amount for procurement of equipment, operation of the centre, etc. in case of I&C Centre, the committee unanimously recommended to declare M/s Rosmerta as L1 and to award the work to this firm.”

In view thereof, he submits that the petitioner is not entitled to relief claimed even otherwise on merit.

15. Mr.Mehra has also confirmed to this Court that as far as furnishing bank guarantee for earnest money of ₹60,00,000/- issued by State Bank of India, Parliament Street, New Delhi, is concerned, the same would be returned to the petitioner in case this Court will pass the order in favour of the respondent.

16. We find force in the argument of the learned ASG when he reads the bidding form which clearly alerts the applicant to keep on checking given E-Mail IDs regularly for the incoming mails from Rajeev.lochan@nic.in. There is a clear instruction or indication in the bidding form itself that the applicants are requested to check the E-Mail IDs more vigilantly and regularly. Once, there is clear instruction in the bidding document to check the given E-Mail IDs, then the petitioner became duty bound to check the given E-Mail IDs regularly without fail. There is no reason for the petitioner not to read the instruction contained in the application form or remain negligent while checking the given E-Mail IDs. We may emphasize that the wordings used in the application form are “given E-Mail IDs” and the E-Mail IDs of the contact person which mean that the petitioners are requested

to check the E-Mail IDs which are provided in the form and only one or two E-Mail IDs. All this would mean that the petitioner is estopped from insisting that the respondent ought to have sent the E-Mail to a particular E-Mail ID when the applicant form clearly instructs the petitioner to remain vigilant about all the E-Mail IDs. Under these circumstances, we do not find any mistake or default on the part of the respondent and as such no infirmity in the impugned order.

17. We also do not agree with the submission of the learned senior counsel Mr. Ravi Gupta that the E-Mail has gone into the spam folder and could not be discovered due to the fault of the respondent and thus resulted in belated reply. Firstly, we find that there is no fault as such on the part of the respondent. The purpose of sending the E-Mail to the petitioner was to communicate with it on the given address which was done by the respondent though on one E-Mail ID. Thereafter, it was the petitioner's duty to discover the E-Mail from the folder and if the same has gone into the spam folder and the petitioner could not discover the said E-Mail due to the said reason, the same cannot by any stretch of imagination be the fault of the respondent but is a technical flaw in the computer system of the petitioner which becomes the responsibility of the petitioner to rectify. The said belated checking of the spam folder is thus not the mistake of the respondent but the responsibility of the petitioner to become more vigilant while keeping a track over its own communications.

18. It is true that ordinarily the respondent ought to have sent the communications to the E-Mail IDs which are given in the application form. However, once the respondent has sent the communication to one given E-Mail ID and the same is also received by the petitioner but as per the

petitioner, the same went into spam folder, we do not find that there exists no communication from the respondent's end to the petitioner or there is a complete default on the part of the respondent which has prejudicially affected the petitioner. We find that if the petitioner could have been vigilant in checking the E-Mails thoroughly in the E-Mail account, probably the petitioner could have been able to provide the response to the respondents timely. Thus, we are unable to infer any fault on the part of the respondent which is vital enough for us to interfere with the tender process at this belated stage.

19. The additional reasoning which compels us to take this view is the delay in approaching the court even after the passing of the order dated 4th April, 2013. We find that the writ petition has been filed before this court only on 6th May, 2013 which is more than a month after the passing of impugned order or communication by the respondent. All this would mean that the petitioner was not vigilant even thereafter in pursuing its remedies and approached the court when the tender process has already passed a substantial stage of financial bid and the rights of the other parties are also created who is likely to fetch the tender being the lowest bidder. The said delay of more than one month also comes in the way of the petitioner to challenge the bidding process at such belated stage of the proceedings when the process of the technical bids and financial bids are almost over even before filing the main writ petition.

20. Mr. Ravi Gupta, learned Senior counsel for the petitioner has laid great stress on the proposition that the conditions of the tender are to be strictly construed and thus the same cannot be departed with. In order to support this proposition, Mr. Gupta relied upon the judgement passed by the

apex court in the case of *B.S. N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd*, (2006) 11 SCC 548 wherein the Apex Court held that the essential conditions in the tender must be strictly adhered to. We are unsure as to how the said authority really aids the case of the petitioner. Even if the said principle of law is applied to the facts of the instant case, one cannot ignore that the petitioner did receive the E-Mail on the given E-Mail ID which went unnoticed. Once, the given E-Mail ID is forming part of the form of the application in the bidding document, even if the said condition of sending the E-Mail is strictly construed, the petitioner did receive the E-Mail though not on all E-Mail IDs but one of the E-Mail IDs. Secondly, the said form also contains a request in the form of alert that the applicants are requested to check the given E-Mail IDs. All this would mean that the strict adherence to bidding document puts the petitioners at fault rather than the respondent. Lastly, the Supreme Court in *B.S.N. Joshi's* case (supra) has made a distinction between the essential conditions of the bidding document from which there is no departure and the ones which are mere trivialities which can be ignored and not strictly insisted upon. We find that once the E-Mail has been received by the petitioner on the given E-Mail ID on the form, then the fact that the other E-Mail IDs did not receive the communication is trivial in nature as the purpose was to inform the applicant company about the clarifications sought for by the respondent. The said E-Mail ID on which the E-Mail was received was of the chairman or the head of the petitioner company in Sweden and the said company itself was the applicant for tender, in these circumstances, there cannot be any serious fault which can be found on the part of the respondent which can vitiate the transaction.

21. It is a well settled principle of law in this field of law that the

challenge laid to the tender process has to be examined from the standpoint of the reasonable in the decision making process and not the correctness of the decision itself. The tender processes are interfered with by the writ courts only upon establishment *ex facie* arbitrariness, malice in fact or in law or ignorance of principles of natural justice which may vitiate the process.

22. Upon testing the present case on the touchstone of the aforementioned principles of laws governing the interference of the writ court in the tender process, we are unable to find any arbitrariness, malice in fact or in law or any mistake or defect in the process of the bidding accorded to the petitioner nor we find any violation of principle of natural justice as the petitioner was well informed on the given E-Mail ID to respond to the clarification by 1st March, 2013 and for which reasonable notice was given as the E-Mail was sent to the petitioner on 21st February, 2013 in this respect. It was however upon the petitioner not to take the process of the bidding lightly by not checking its E-Mail ID properly and thoroughly in its folders which became the reason of the delay. Under these circumstances, we also find that the decision making process accorded to the petitioner is reasonable one and cannot be said be suffering from vice of arbitrariness or unreasonableness.

23. In the result, we find no merit in the writ petition and the same is dismissed. All interim orders are vacated. All pending CMs are disposed of.

(MANMOHAN SINGH)
VACATION JUDGE

(R.V. EASWAR)
VACATION JUDGE

JUNE 07, 2013